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Department of Pesticide Regulation

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Gray Davis
Governor

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ENF 99-037

TO: County Agricultural Commissioners

SUBJECT: STATE AUTHORITY TO REGULATE PESTICIDE USE ON FEDERAL FACILITIES AND ON TRIBAL LANDS

A. Federal Facilities

This policy addresses the regulation of pesticide use on federal facilities and the administrative actions that may be taken against persons who violate the State's pesticide laws when on federal facilities. This policy summarizes the Department of Pesticide Regulation's (DPR's) Legal Office's and Pesticide Enforcement Branch's research on this issue to date; however, it does not include guidance from the U.S. Environmental Protection Agency (U.S. EPA), which DPR requested over one year ago. When U.S. EPA provides the requested guidance, DPR will evaluate the new information and consider changes to this policy where appropriate.

Where the term "federal facilities" is used, it includes all property under the control of the federal government and federal employees. The term "state laws" includes implementing regulations, and the terms "the State" and "states" include county agricultural commissioners (commissioners).

This policy supercedes Enforcement Letters 97-55 and 97-71, Information Request 90-80 and any other correspondence issued by DPR that conflicts with the contents of this Enforcement Letter.

1. Background:

a. Direct Regulation and Civil Penalties:

Only Congress or the President, if authorized by federal statute, can require the federal government to comply with state regulatory laws on federal facilities. However, even where the federal government is required to comply with certain state laws, states cannot levy penalties against the federal government for violation of those laws unless clearly authorized by federal statute to do so.



At present, Congress has not required the federal government to comply with state pesticide laws and has not authorized states to levy civil penalties against the federal government for violation of those laws. Apart from the exceptions listed below, the State cannot directly regulate pesticide use by federal employees on federal facilities. Nor can the State impose civil penalties against federal agencies, officials, or employees for violations of state pesticide laws on federal facilities. Constitutional law also shields private contractors from direct regulation and civil penalties when they are hired by a federal agency to operate a federal facility to satisfy a federal mandate.

Policy:

In our earlier policy statements, we mistakenly equated pest control operators who *work on* federal facilities with private contractors who *operate* federal facilities. Pest control businesses do not operate federal facilities; they are hired to perform some of the tasks necessary to the operation of the facility under the supervision of the facility operator. Also, to our knowledge, there are no federal mandates that specifically require the use of pesticides on federal facilities. Therefore, DPR and the commissioners have authority to directly regulate private persons who conduct pest control activities on federal facilities at the request of, or under contract to, a federal agency or the operator of the federal facility. DPR and the commissioners can also impose penalties on these private persons for violations of state pesticide laws.

DPR and the commissioners also have regulatory and penalty authorities over private persons and the applicators they hire, who lease or use federal facilities for personal purposes rather than to fulfill a federal mandate.

b. Executive Order 12088 - Federal Compliance with Pollution Control Standards:

Executive Order 12088, "Federal Compliance with Pollution Control Standards," requires federal agencies to comply with pollution control standards established pursuant to specified federal statutes, including the Federal Insecticide, Fungicide, and Rodenticide Act. It became effective in 1978 and has not been withdrawn or superceded to date.

This Executive Order obliges federal agencies to comply with applicable pollution control standards; to take steps necessary to prevent, control or abate environmental

pollution that occurs on their facilities; and to work cooperatively with federal, state, and local agencies to resolve disputes.

The Executive Order does not provide DPR or the commissioners with authority to compel federal agencies' compliance with state pesticide laws or to take civil penalty actions against a federal agency, official, or employee for violations of these laws. Instead, it allows state and local agencies to request the Administrator of U.S. EPA to resolve conflicts that arise concerning federal agency compliance with state and local pollution control standards.

Since the Executive Order does not clearly define "pollution control standards," the courts, federal agencies, and regulatory agencies have been left to determine the applicability of environmental requirements on a case-by-case basis. In Sierra Club v. Peterson (consolidated with Coalition for Alternatives to Pesticides in Northern California v. Block), the federal appellate court found California's restricted material permit program to be a pollution control standard under this Executive Order and that the U.S. Forest Service was required to obtain a permit before using 2,4-D on property under their control located in California (see ENF 83-55 and ENF 83-94).

Policy:

Using this case as a guide, DPR decided that the following are pollution control standards within the context of the Executive Order:

1. The pesticide registration program;
2. The restricted material permit program;
3. The pesticide storage, transportation, and disposal program;
4. The general standards of care regarding pesticide applications listed in Title 3 of the California Code of Regulations, sections 6600, and 6602 – 6616;
5. The ground and surface water protection programs; and
6. The toxic air contaminants program.

c. Federal Agencies' Plans for Applicator Certification:

Federal law requires U.S. EPA to designate the pesticides they register as general or restricted use. Only certified applicators may handle or supervise the use of restricted use pesticides so designated by U.S. EPA. U.S. EPA approves applicator certification plans proposed by states, tribes, and federal agencies. Federal agencies may qualify federal

employees under an approved Federal Agencies Plan or they may obtain applicator certification from the states where their facilities are located.

The following bureaus or agencies within federal departments may certify applicators under an approved federal plan:

- Department of Defense: The Army (including the Army Corps of Engineers), Navy (including the Marine Corps), and the Air Force.
- Department of Energy: The Bonneville Power Administration only.
- Department of the Interior: The Bureau of Land Management, the Bureau of Indian Affairs, and the National Park Service.
- Department of Agriculture: All components, including the Forest Service.

Federal regulations require states to accept federal employees qualified under approved federal plans or to describe any additional requirements in the State's Plan for Certification of Commercial and Private Applicators of Restricted Use Pesticides. California's approved plan requires federal agencies to "provide assurance that their applicators are knowledgeable concerning California laws and regulations pertaining to pesticides." Recently, DPR reviewed the Department of Defense's applicator certification program and determined that their program meets this requirement. DPR intends to contact the agencies listed above regarding the content of their approved federal plans in the near future.

Policy:

At present, DPR will accept applicator certification from the agencies listed above. Federal employees certified under their agency's approved federal plan must present a current certificate to the commissioner when applying for a restricted material permit and to a licensed pesticide dealer when purchasing restricted use pesticides.

2. Federal Facility Policy Summary:

a. Federal employees performing pest control on federal facilities:

i. Regulatory Requirements:

1. Must comply with federal, state, and local pollution control standards established pursuant to the Federal Insecticide, Fungicide, and Rodenticide Act per Executive Order 12088.

2. Must obtain applicator certification prior to the purchase and use of restricted use pesticides.
3. Must comply with requirements on the registered pesticide label.
- ii. *Administrative Actions and Civil Penalties:*
 1. DPR and the commissioners cannot assess civil penalties for violations of state or federal law.
 2. DPR and the commissioners can refuse, revoke, or suspend any license, certificate, registration, or permit issued by DPR or the commissioners for violations of state laws.
 3. Per Executive Order 12088, U.S. EPA is responsible for dispute resolution between a federal facility and a federal, state, or local regulatory agency. The commissioners should inform DPR when they determine that a federal agency violated a pollution control standard and failed to cooperate in correcting the problem.
- b. **Persons who are not federal employees and who are hired by or under contract to a federal agency or the facility operator to perform pest control on a federal facility; and**
- c. **Private persons who lease or contract for the use of federal facilities for private activities; and**
- d. **Federal employees who perform pest control on property not owned or operated by a federal agency:**
 - i. California laws apply to the persons listed in b, c, and d.
 - ii. DPR and commissioners can take administrative actions for violations of state laws. Administrative civil penalty action would be in lieu of criminal prosecution or civil penalties by DPR through the Attorney General. Commissioner's administrative action against a county-issued registration or permit and DPR administrative action against a DPR-issued license or certificate, can be in addition to any other commissioner and/or DPR administrative civil penalty action, criminal prosecution, or DPR civil penalty action through the Attorney General.
 - iii. DPR or commissioners can seek criminal prosecution.
 - iv. DPR can seek civil penalties through the Attorney General (in lieu of criminal prosecution).

B. Tribal Lands:

States have no jurisdiction to enforce their laws on Native American Tribal lands unless specifically authorized by Congress to do so. Congress has not authorized California to enforce its pesticide laws on Tribal lands. Therefore, the State and commissioners cannot impose civil penalties against persons for violations of the State's pesticide laws on Tribal lands

C. Activity Reporting and Follow-Up:

Please record all pesticide use enforcement activities conducted on federal facilities or Tribal lands in the appropriate categories on Report 5 for mill assessment disbursement.

If you observe violations on federal facilities, follow the options listed in this policy and in the Enforcement Guidelines. If you are denied access to a federal facility or if you determine that a federal agency is unwilling to correct noted violations, please contact your Senior Pesticide Use Specialist immediately. Depending on the nature of the issue, DPR will work with you and the federal agency to resolve the problem or will forward the information to U.S. EPA for resolution at a higher level.

If you have any questions pertaining to this policy or other federal facilities issues, please contact your Senior Pesticide Use Specialist, or Ms. Lisa Quagliaroli, Program Specialist, at (916) 327-2035.

Sincerely,

A handwritten signature in black ink, appearing to read "David Duncan", written in a cursive style.

David Duncan, Acting Chief
Pesticide Enforcement Branch
(916) 445-3852

cc: see next page